No. _____

IN THE SUPREME COURT OF THE UNITED STATES

RAYMOND GHALOUSTIAN
Petitioner,
v.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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QUESTION PRESENTED

The Court has held that where a defendant's statements are admitted in the Government's case-in-chief in violation of *Miranda v. State of Arizona*, 384 U.S. 436 (1966), the defendant's trial-testimony is "the fruit of the poisonous tree," such that it may not be admitted in a future trial. *Harrison v. United States*, 392 U.S. 219, 224 (1968). Here, the Government never faced a retrial because it argued in the direct appeal that any violation of *Miranda* was harmless in light of the defendant's own testimony in his defense. Thus, this case presents a procedural question resulting from the holding of *Harrison*: Does a defendant forfeit reliance upon *Harrison* by failing to anticipate in his opening brief on appeal that the Government would argue violations of *Miranda* were harmless in light of the defendant's testimony?

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INTRODUCTION

Harrison v. United States enshrined a simple rule that where a defendant testifies in their own defense "after the Government had illegally introduced into evidence" the defendant's wrongfully obtained confessions, "the same principle that prohibits the use of confessions so procured also prohibits the use of any testimony impelled thereby—the fruit of the poisonous tree." 392 U.S. 219 (1968). Straightforward application of that *Harrison*-rule to a defendant's direct appeal precludes the Government from "use of any testimony impelled" by a *Miranda* violation to argue the same violation of *Miranda* was harmless. However, the Government evades these simple rules. Ninth Circuit evaded such a ruling by concluding petitioner failed to pre-rebut the Government's harmlessness argument in his opening brief.

To facilitate appellate review of *Miranda* violations, promote confidence in the fairness of trials, and afford Due Process to criminal defendants, the Court should intervene to hold that a criminal defendant does not forfeit reliance on this Court's precedent by failing to pre-rebut all possible harmlessness arguments in an opening brief.

STATEMENT OF RELATED CASES

This case concerns an appeal from the judgement entered in *United States v. Raymond Ghaloustian*, Central District of California case number 2:19-cr-00714-PA. The petition for certiorari arises from a direct appeal in Ninth Circuit Court of Appeals case number 21-50218.

OPINION BELOW

The unpublished opinion of the U.S. Court of Appeals for the Ninth Circuit is reproduced in the appendix. Pet. App. 1a-5a.

JURISDICTION

The court of appeals entered its order on May 31, 2023. Pet. App. 1a. On September 25, 2023, the court of appeals denied petitioner's request for rehearing or hearing en banc. Pet. App. 6a. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATEMENT OF THE CASE

Mr. Ghaloustian was charged and convicted of six offenses stemming from two traffic stops in which he was found in possession of a small amount of

methamphetamine and a firearm. During the first stop, he was violently arrested at gunpoint and questioned seconds later without any *Miranda* advisal. He made incriminating statements that multiple people could smoke the methamphetamine from his pocket. During the second stop, he was in a parked car with a passenger and other peoples' things, when officers detained him. Police found a fake passport in a purse and elicited an incriminating statement ("it's my purse") tying him to both a scale and methamphetamine inside.

He moved to suppress the foregoing statements taken without any *Miranda*-advisal and the district court denied his motions. At trial, the Government offered his un-*Mirandized* statements in its case in chief. Mr. Ghaloustian subsequently testified in his own defense, trying to explain that he was an addict who did not sell or share the small quantities of drugs. Dueling experts agreed that the quantity of methamphetamine found during each arrest was approximately $100 worth and less than a week's supply for a serious addict. Nonetheless, Ghaloustian was convicted and was sentenced to three consecutive mandatory minimum sentences amounting to twenty years in prison.

Mr. Ghaloustian's opening brief before the Ninth Circuit argued that the district court erred in denying his motions to suppress statements obtained in violation of *Miranda*. AOB 26-38. Mr. Ghaloustian further argued that these *Miranda* errors were not harmless beyond a reasonable doubt and therefore required reversal. *Id.* at 36-39.

Notwithstanding Mr. Ghaloustian's preemptive arguments on the subject, the Government conceded that it bore the burden of demonstrating that any *Miranda* violation was harmless beyond a reasonable doubt. GAB at 42. The Government tried to meet that burden by repeatedly relying upon Mr. Ghaloustian's testimony at trial. *Id.* at 44 & 46.

In Reply, Mr. Ghaloustian pointed out that this part of the Government's harmlessness argument is foreclosed by controlling Supreme Court precedent, which treats a defendant's testimony under these circumstances as fruit of the *Miranda* violation at trial. ARB at 3 & n.4 (citing *Harrison v. United States*, 393 U.S. 219 (1968)). Since his trial testimony was presumptively the fruit of any *Miranda*-error during the Government's case-in-chief, Mr. Ghaloustian argued, the Government could not rely upon his testimony without first showing Mr. Ghaloustian would have testified regardless of the erroneous admission of any un-*Mirandized* statements. *Harrison*, 393 U.S. at 223-25. The Government never undertook to meet that burden.

In an unpublished decision, the Ninth Circuit declined to address *Harrison v. United States* because it was "raised for the first time in a reply brief." Pet. App. 3a n.1. (citing *Cedano-Viera v. Ashcroft*, 324 F.3d 1062, 1066 n.5 (9th Cir. 2003)). Having avoided controlling precedent to the contrary, the Ninth Circuit concluded that even if a statement "was elicited in violation of *Miranda*," it was rendered harmless when Mr. Ghaloustian testified because the Government could have

introduced the same statements "to impeach" Mr. Ghaloustian's testimony rather than in its case-in-chief. Pet. App. 3a.

Mr. Ghaloustian petitioned for rehearing or hearing en banc and the Government was ordered to respond. The Ninth Circuit declined to rehear the case or consider it en banc and this petition follows.

REASONS FOR GRANTING THE PETITION

It is also well established that a Court may, even if it finds error, affirm on an alternative basis raised by appellee. When it does so, any error is deemed harmless.[1] However, the Circuits have unanimously held that when appellee raises those alternative bases in the direct appeal answering brief, appellant's reply brief can raise new, responsive arguments that may have been omitted from the opening brief.[2] That basic rule makes sense. "An appellant is not required to anticipate and rebut in his opening brief every possible ground for affirmance that the [appellee] might (or

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[1] *See, e.g., Khalsa v. Weinberger*, 779 F.2d 1393, 1396 (9th Cir.), *aff'd*, 787 F.2d 1288 (9th Cir. 1985) (error "was harmless" because court reached the "appropriate result"); *United States v. Two Elk*, 536 F.3d 890, 900 (8th Cir. 2008) (alternative admission of evidence covering the same ground rendered error harmless).

[2] *Holmes v. Spencer*, 685 F.3d 51, 66 (1st Cir. 2012); *United States v. Bari*, 599 F.3d 176, 181 (2d Cir. 2010); *McCray v. Fid. Nat. Title Ins. Co.*, 682 F.3d 229, 241 (3d Cir. 2012); *United States v. Ramirez*, 557 F.3d 200, 203 (5th Cir. 2009); *United States v. Jerkins*, 871 F.2d 598, 602 n.3 (6th Cir. 1989); *Bennett v. Tucker*, 827 F.2d 63, 69 n.2 (7th Cir. 1987); *United States v. Miranda-Zarco*, 836 F.3d 899, 902 n.1 (8th Cir. 2016); *Ellingson v. Burlington N., Inc.*, 653 F.2d 1327, 1332 (9th Cir. 1981); *United States v. Bohn*, 956 F.2d 208, 209 (9th Cir. 1992); *Sadeghi v. I.N.S.*, 40 F.3d 1139, 1143 (10th Cir. 1994); *United States v. Powers*, 885 F.3d 728, 731–32 (D.C. Cir. 2018).

might not) raise . . . . It is enough if the appellant contests the grounds on which the district court actually decided the case against him." *Hussein v. Oshkosh Motor Truck Co.*, 816 F.2d 348, 359 (7th Cir. 1987) (opinion of Posner, J.).[3] The Ninth Circuit's decision not to address *Harrison v. United States* because Mr. Ghaloustian raised it in the reply brief runs afoul of the Court's precedent and erodes *Miranda* by preventing defendants from obtaining appellate review on the merits.

When the Government tried to meet its burden on harmlessness by relying upon Mr. Ghaloustian's trial testimony, Mr. Ghaloustian pointed out that the argument was foreclosed by *Harrison* at his earliest opportunity – the reply brief. That was proper and does not constitute waiver.[4] The only circumstances in which Ghaloustian could have raised Harrison earlier would have been if he had anticipated that the Government would argue Mr. Ghaloustian's testimony at trial rendered the Miranda-error harmless beyond a reasonable doubt even though such an argument is foreclosed by Supreme Court precedent. Neither this Court, nor any other, has ever required such clairvoyance.

Furthermore, it cannot be that Mr. Ghaloustian waived reliance upon *Harrison* by failing to raise it in the opening brief because Mr. Ghaloustian was not required to preemptively address harmlessness in his opening brief at all. Rather, if appellant demonstrates a constitutional violation, those violations "presumptively require[]

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[3] *See also Walker v. Exeter Region Co-op. Sch. Dist.*, 284 F.3d 42, 47 (1st Cir. 2002) (appellant is not required to "anticipate" every "alternative ground and address it in their opening brief").

[4] *Supra* note 4.

reversal" without any additional showing in the opening brief that the errors were not harmless. *United States v. Gonzalez-Flores*, 418 F.3d 1093, 1099 n.3 (9th Cir. 2005). The Government conceded that constitutional error identified on appeal "requires reversal" unless the Government "proves," through its briefing and argument, that the error was harmless beyond a reasonable doubt. *United States v. Williams*, 435 F.3d 1148, 1162 (9th Cir. 2006); GAB at 42. Thus, the Government-Appellee waives harmlessness arguments it does not assert in the Answering Brief. *Gonzalez-Flores*, 418 F.3d at 1100 (adding "[t]his approach makes perfect sense in light of the nature of the harmless-error inquiry: it is the government's burden"). This is why at least one circuit has described a defendant's effort to address harmlessness in an opening brief as "preemptive." *United States v. Samaniego*, 187 F.3d 1222, 1225 (10th Cir. 1999).

The Ninth Circuit's holding turns these controlling and persuasive precedents on their head in a manner that ignores *Harrison* and erodes *Miranda* by requiring Mr. Ghaloustian pre-rebut the Government's yet-to-be-announced arguments that any error was harmless. But, the Answering Brief was the first time either party sought to rely upon Mr. Ghaloustian's testimony in the harmlessness analysis.[5] Thus, the Government introduced the issue and Mr. Ghaloustian properly replied. The Ninth Circuit was wrong to conclude Mr. Ghaloustian forfeited any reliance upon

[5] GAB at 44 & 46.

Harrison by failing to raise it before the Government injected the issue in the first instance.

While it is true appellate courts will not ordinarily entertain "new issues" raised for the first time in a reply brief, they use that phrase in reference to purported errors by the district court or bases for reversing the district court, which an appellant waives or forfeits by raising too late. The circuits frequently distinguish between "issues" and "arguments" to determine what may be raised in a reply brief. *United States v. Bari*, 599 F.3d 176, 181 n.6 (2d Cir. 2010).[6] Here, the argument which the Ninth Circuit refused to consider was not a "new issue" or claim necessitating reversal (which Ghaloustian would have waived by raising too late), it was an argument responsive to part of the Government's harmless-error position (which Ghaloustian did not know before the Answering Brief).[7]

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[6] *See also Wilson v. O'Leary*, 895 F.2d 378, 384 (7th Cir. 1990) (opening brief must contain all "ground for reversal," whereas reply may respond to appellee).

[7] An examination of *Harrison v. United States*, 392 U.S. 219, 223–25 (1968), further illustrates the difference. *Harrison*, which the Ninth Circuit refused to consider, only provides a rule for the use of a defendant's testimony when a *Miranda* violation is identified. Thus, the fact that Mr. Ghaloustian testified does not afford a freestanding basis for reversal of the district court here and Mr. Ghaloustian never contended that the district court erred in failing to suppress his own testimony. Rather, because Mr. Ghaloustian has demonstrated violations of Miranda, *Harrison* precludes the Government from relying upon his testimony in other proceedings like these unless it makes a predicate showing that he would have testified regardless of the *Miranda* violation. *Harrison*, 392 U.S. at 223–25. Thus, Mr. Ghaloustian's testimony cannot be used to demonstrate the *Miranda* violations were harmless – *Harrison* creates a presumption that the defendant's testimony be treated in future proceedings as fruit of the constitutional violation which preceded it. *Id.*

Contrary to the Ninth Circuit's conclusion, the circuits frequently permit a criminal defendant to see whether the Government will raise a possible argument in its answer before addressing it head on in reply. *See United States v. Garcia-Lopez*, 309 F.3d 1121, 1122 (9th Cir. 2002) (government could waive reliance upon plea agreement); *United States v. Powers*, 885 F.3d 728, 732 (D.C. Cir. 2018) ("Powers was not required to assume in his opening brief that the government would rely on the appeal waiver."); *United States v. Goodson*, 544 F.3d 529, 536 (3d Cir. 2008) ("defendant is not obliged in his opening brief to acknowledge the existence of an appellate waiver and/or to explain why the waiver does not preclude appellate review" and may do so only after it is invoked by the Government). The decision whether to address such matters in the opening brief is "of tactical importance only." *United States v. Goodson*, 544 F.3d 529, 536 (3d Cir. 2008).

Nor is there anything unfair in permitting a defendant to point out in their reply brief that an answering brief presses arguments that are foreclosed by this Court's precedent.[8] The Government's burden was always doubly clear because the Government bore the burden of demonstrating harmlessness and, insofar as reliance

[8] For this same reason, even if Mr. Ghaloustian had waived reliance upon *Harrison* by failing to raise it in the opening brief, the Ninth Circuit should have reached the merits of his argument. *See Hormel v. Helvering*, 312 U.S. 552, 557 (1941) ("Rules of practice and procedure are devised to promote the ends of justice, not to defeat them. [. . .] Orderly rules of procedure do not require sacrifice of the rules of fundamental justice."). The lower court's failure to address the merits of Mr. Ghaloustian's *Harrison*-based arguments and, as a result, the underlying *Miranda*-error results in manifest injustice because it implicates serious violations of his constitutional rights and the validity of convictions for which Mr. Ghaloustian is serving twenty years in prison.

upon Mr. Ghaloustian's testimony was concerned, the additional burden of demonstrating "its illegal action did not induce his testimony." *Harrison v. United States*, 392 U.S. 219, 224 (1968).[9] Thus, it was the Government which waived the issue by not attempting to meet the latter burden in its principal brief before the Circuit Court.

Ultimately, this is not a case where Mr. Ghaloustian idly waited to sandbag the Government in his reply with surprise arguments. Such failures of anticipation cannot result in a waiver where appellant responds in the reply brief. *Hussein v. Oshkosh Motor Truck Co.*, 816 F.2d 348, 359 (7th Cir. 1987) (opinion of Posner, J.); *Walker v. Exeter Region Co-op. Sch. Dist.*, 284 F.3d 42, 47 (1st Cir. 2002). The Ninth Circuit's contrary decision should be reversed to that the rules of *Harrison* and *Miranda* can carry force in the lower courts.

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For these reasons, this Court should grant review here.

CONCLUSION

The petition for a writ of certiorari should be granted.

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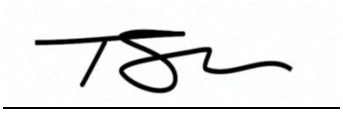
[9] Further, demonstrating the interrelated nature of these two burdens imposed exclusively upon the Government, *Harrison* relied, in part, upon *Chapman v. California*, 386 U.S. 18, 23 (1967), as establishing the Government's burden to prove testimony was not impelled by a violation of *Miranda*. *Harrison*, 392 U.S. at 224. That portion of *Chapman*, for its part, established that it is the Government's burden in an appeal to demonstrate that any constitutional error was harmless beyond a reasonable doubt. 386 U.S. at 23.

Respectfully submitted,



December 19, 2023

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